



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 93,
LITCHFIELD TOWN EMPLOYEES :

Complainant :

v. :

TOWN OF LITCHFIELD :

Respondent :

CASE NO. A-0579

DECISION NO. 97-090

APPEARANCES

Representing AFSCME/Litchfield Town Employees:

James C. Anderson, Staff Representative

Representing Town of Litchfield:

Gary W. Wulf, Negotiator

Also appearing:

Cecile Durocher, Town of Litchfield

Cecil Durocher, Town of Litchfield

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Council 93 (Union) filed a Petition for Certification of a bargaining unit of employees employed by the Town of Litchfield on September 20, 1996. The Town of Litchfield (Town) filed objections on October 2, 1996. This matter was heard before a hearing officer on October 25, 1996 and December 11, 1996 after which the Union filed for leave to amend its

petition on December 23, 1996 followed by the Town's objections thereto filed on January 7, 1997. The record before the hearing officer was closed on April 4, 1997. The hearing officer's decision was issued on May 2, 1997.

The hearing officer's findings are discussed in our Findings of Fact. The Union filed a Motion for Rehearing on June 2, 1997; the Town filed objections to the rehearing on June 13, 1997. Rehearing was granted and noticed to the parties on June 26, 1997. The PELRB conducted that rehearing on August 7, 1997.

FINDINGS OF FACT

1. The Town of Litchfield is a "public employer" within the meaning of RSA 273-A:1 X.
2. AFSCME seeks the formation of a bargaining unit, as amended, consisting of secretary (1), secretary/bookkeeper (1), deputy town clerk (1), office clerk (1), librarian (1), firefighter/EMT (2) and incinerator/landfill operator (5). The position of librarian was stipulated out in hearings before the hearing officer. The hearing officer was asked to consider a laborer's position and an additional incinerator/landfill operator's position in the Union's Motion for Leave to Amend filed December 23, 1996. Thus, twelve (12) separate positions, not to be confused with job titles, were considered by the hearing officer.¹
3. The hearing officer's decision (Decision No. 97-047) excluded four (4) positions from the proposed unit. Excluded were the deputy town clerk/tax collector because it was an appointed position, the secretary/clerk to the board of selectmen because of confidentiality, the landfill operator/incinerator facilities manager because of supervisory functions under RSA 273-A:8, and the amended laborer's position, referred to as a part-time laborer in the decision, because the incumbent is hired by and "serves at the pleasure"

¹ The original petition was for 12 positions; one (the librarian) was omitted by stipulation, leaving eleven. Two positions were included in the Union's Motion for Leave to Amend but one was duplicative of an incinerator position in the original petition. Thus, the net number considered was twelve.

- of the road agent. This determination brought the proposed bargaining unit to fewer than ten; therefore, no unit was certifiable.
4. We affirm the hearing officer's determination relative to the exclusion of the secretary/clerk who, it is acknowledged, takes minutes of the non-public meetings of the board of selectmen even though this is not a part of her job description or job duties. There is another bargaining unit operating in the Town represented by the petitioner herein. The secretary/clerk would be in a position to learn about executive session discussions concerning matters in that bargaining unit. She is appropriately excluded under Appeal of the City of Laconia, 135 NH 421 (1992).
 5. After review the hearing officer's findings and the testimony offered at rehearing, we reverse on the issue of the deputy town clerk/tax collector. The hearing officer concluded that the deputy town clerk/tax collector was "appointed" and exempted as a public employee under RSA 273-A:1 IX (b). We disagree. RSA 273-A:1 IX (b) exempts "persons appointed to office by the chief executive or legislative body of the public employer." We understand the deputy town clerk/tax collector to have been appointed by the town clerk pursuant to RSA 41:45-c. In making this appointment, we do not consider the town clerk, as appointing authority, to be doing so either as the "chief executive" or "legislative body" of the town, thus there is no basis for the exemption. This position is neither supervisory (RSA 273-A:8) nor elective (RSA 273-A:1 IX). It is appropriate for inclusion.
 6. The hearing officer found that the part-time laborer in the highway department is not an on call employee. We affirm that conclusion. At rehearing former selectman Cecil Williams explained that the road agent is elected (not a position being considered in the pending petition) and subsequently names and directs the hiring of any assistants. The part-time laborer is such an assistant. Because the part-time laborer position works for the road agent and because the tenure of this position could be dubious should the

road agent change, the hearing officer concluded that there was a different employing entity and a lack of common working conditions [RSA 273-A:8 I (a)] such as to warrant exclusion from the bargaining unit. We disagree and reverse. On rehearing we learned that the incumbent has been so employed two or three years. He is paid by the Town, with Town funds, from the Highways and Streets appropriation under the "Workmen Wages" line. (Town appellate exhibit No, 3.) Should he become injured in the course of his duties, his workers compensation benefits are derived through the Town, not through the road agent. Thus, salary and limited benefits such as workers compensation (extended benefits such as insurance, vacations or holidays are not extended to this position) are controlled by the Town. This position exhibits the characteristics of a Town employee and is appropriate for inclusion.

7. The landfill operator/incinerator facilities manager (LO/IFM) was excluded by the hearing officer as a supervisory position under RSA 273-A:8 II. The hearing officer found that this position exercised "significant discretion in personnel matters" because the position reports directly to the selectmen and because the incumbent "attends meetings of the selectmen on occasion to give recommendations for promotions..." The incumbent also creates work schedules and is involved in budgeting (for the first time this past year) and equipment purchases. We reverse the hearing officer because the decision to exclude is contrary to certain findings in Decision No. 97-047, namely, because the incumbent "works alongside fellow employees" and because he testified below "that he has never needed to exercise discipline and believes that he has no authority to actually discipline or terminate employees." (Finding No. 5, below.) We have reviewed the record below and have seen where the incumbent has recommended three step increases, all in 1996 (Town Exhibit No. 7, below), has been referred to as "facility manager" in two 1995 and 1996 documents (Town Exhibit No. 8, below), and has received memoranda generically directed to "department heads." (Town Exhibit No. 5, below). Taken alone, we do not believe these "indicia of supervisory authority" are sufficient to confer the requisite

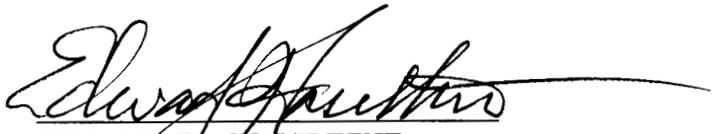
"significant discretion" to exclude under RSA 273-A:8. When considered in conjunction with the incumbent's own belief as to the limits on or the extent of his authority and the extent to which he has, or has not, exercised that authority in the past, we believe this position is appropriate for inclusion. In reaching this conclusion, we believe it is important to tip the scales in favor of what the incumbent typically has done as part of his job, rather than what he could do, because evidence of historical fact is, we believe, far more reliable than the discharge of potential responsibilities.

DECISION AND ORDER

Based on the foregoing, we reverse the findings of the hearing officer on the positions of deputy town clerk/tax collector, part-time laborer at the highway department and landfill operator/incinerator facilities manager. These three positions shall be added to the eight validated positions (namely, the secretary/bookkeeper, office clerk, two firefighters/EMT's, three laborers at the incinerator and one assistant landfill operator/facilities manager) in Decision No. 97-047 to form an eleven (11) member bargaining unit.

So ordered.

Signed this 17th day of September, 1997.


EDWARD J. HASELTINE
Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and William Kidder present and voting.